

Editor's note: Reconsideration denied by Order dated Jan. 15, 1985; overruled -- See South Central Utah Telephone Assoc. Inc., 98 IBLA 275 (July 17, 1987)

COLORADO-UTE ELECTRIC ASSOCIATION, INC.

IBLA 83-509

Decided November 15, 1984

Appeal from decision by Colorado State Office, Bureau of Land Management, determining fair market rental value of communications site right-of-way C 33326.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

Amendment of sec. 504(g) of the Federal Land Policy Management Act of 1976 to permit grants of rights-of-way for electric and telephone facilities without payment of fees in certain cases applies only to rights-of-way for transmission lines, and does not include a right-of-way for a microwave radio site within the facilities excused from payment of fees.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights of Way: Federal Land Policy and Management Act of 1976

A hearing will be ordered where issues of fact concerning value are raised substantially disputing a decision imposing rental charges on a Rural Electrification Act cooperative for microwave site right-of-way grant pursuant to sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1982).

APPEARANCES: John R. McNeill, Esq., and Carol A. Curran, Esq., Montrose, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On November 13, 1981, the Colorado State Office, Bureau of Land Management (BLM), granted Colorado-Ute Electric Association, Inc. (Colorado-Ute), right-of-way C 33326 for a microwave radio site on the Black Ridge Communications site near Grand Junction, Colorado, pursuant to Title V of the Federal

Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (1982), and 43 CFR 2800. The grant was later amended on April 30, 1982, in particulars affecting the description of the site and improvements. The right-of-way is for a term of 30 years, and provides, among other things, that Colorado-Ute will pay fair market value for the use of the right-of-way, when that value is established by BLM.

On March 4, 1983, pursuant to authority provided by FLPMA section 504(g), 43 U.S.C. § 1764(g), and Departmental regulation 43 CFR 2803.1-2, a valuation of the fair market rental value for the right-of-way was established at the rate of \$1,000 to be charged annually for a 5-year term beginning November 13, 1981. Colorado-Ute appealed the decision, alleging the value determination was in error because it (1) overestimated the size of the right-of-way to be occupied by Colorado-Ute, (2) failed to recognize the site was jointly occupied by other users and, thus, did not adjust for the nonexclusivity of appellant's grant, (3) and was based upon an appraisal using values from other sites which were not comparable in fact to the Black Ridge site. Additionally, Colorado-Ute claimed that it is an association entitled under provision of 43 CFR 2803.1-2(c)(2) to use the communications site for no fee or for a charge at less than fair market value. In this connection, Colorado-Ute states that it is a cooperative operated for the benefit of its members, is a nonprofit association, and that its member-owners are all nonprofit associations. A document appearing in the BLM case file entitled 1980 Annual Report Colorado-Ute Electric Association indicates, at 23, that Colorado-Ute is financed under provision of the Rural Electrification Act.

This appeal is nearly identical in all factual respects to Colorado-Ute Electric Association, Inc., 79 IBLA 53 (1983), a case involving this same appellant and a BLM determination of fair market value for use of a microwave radio site in Colorado. In Colorado-Ute Electric Association, Inc., *supra*, this Board ordered a hearing into the matters placed in issue by Colorado-Ute concerning the size and appraisal of the microwave site involved in that case. The Board, however, rejected Colorado-Ute's contention that the association was entitled to relief from payment of the fair market value of the right-of-way by virtue of its nonprofit organization status, citing 43 CFR 2803.1-2(c) and Tri-State Generation & Transmission Association, Inc., 63 IBLA 347, 89 I.D. 227 (1982). As that opinion points out, prior Board decisions had uniformly rejected appeals by electric cooperatives for special consideration because of their non-profit status alone.

Since the decision in Colorado-Ute Electric Association, Inc., which issued on February 9, 1984, and the March 4, 1983, BLM decision rendered in this case, Congress, on May 25, 1984, amended FLPMA section 504(g) to provide that electric facilities financed under the Rural Electrification Act of 1936 shall be placed upon rights-of-way without payment of rental fees, See P.L. 98-300, 98 Stat. 215; La Plata Electric Association, Inc., 82 IBLA 159 (1984). It is clear from the language of the amendment that only a limited range of right-of-way fees are to be affected. The amended Act provides:

Rights-of-way shall be granted, issued, or renewed, without rental fees, for electric or telephone facilities financed pursuant to the Rural Electrification Act of 1936, as amended, or any extensions from such facilities: Provided, That nothing

in this sentence shall be construed to affect the authority of the Secretary granting, issuing, or renewing the right-of-way to require reimbursement of reasonable administrative and other costs pursuant to the second sentence of this subsentence.

(P.L. 98-300, May 25, 1984, amending section 504(g) of FLPMA). Although the language of the amendment does not in so many words limit the application of the amended Act to federally funded owners of transmission lines or to telephone and electric lines only, the recorded remarks of the members of Congress who proposed the amendments indicate that it was the intention of Congress to so limit the Act. Thus, the statement of Congressman Seiberling declared the purpose of the bill "is a simple and straightforward proposal. It applies only to telephone or electric lines which are being federally subsidized through the Rural Electrification Act." Later in his remarks the Congressman reiterated the assertion that only lines are to be affected by the Act when he stated, after explaining that the length of lines in relation to the number of customers served raises the cost of supplying service to the rural customer, that "[c]ertainly we should not add to that cost when we are allowing those lines to cross Federal lands since it does not cost the Federal Government any additional money * * *." 129 Cong. Rec. H9316 (daily ed. Nov. 8, 1983).

The remarks of Congressman Marlenee further tend to support the conclusion that only transmission lines were intended to be exempt from the requirement of FLPMA section 504(g) that a fee for rights-of-way be charged to applicants seeking to use the Federal lands. Expanding upon the arguments advanced by Congressman Seiberling, Congressman Marlenee stated:

H.R. 2211 is simply an extension of the good neighbor policy. Where REA cooperatives operate, landowners provide free access for electrical and telephone lines to cross their land even when those facilities cross their land to provide service to the Government. There is no reason for the Federal Government to exempt itself from this good neighbor policy.

Id. Finally, also speaking in support of the amendment, Congressman Oberstar again stated the argument concerning rights-of-way for transmission lines: "The major overhead cost to cooperatives is the long powerline requirements. * * * Anything which substantially increases these costs imposes new burdens on these companies and adds to the power and telephone costs for consumers." Id. at H9318.

The Senate report also supports the view that Congress intended to excuse payment of fees for transmission line rights-of-way only. That report indicates, at page 2, the reason for the amendment to FLPMA, section 504(g) is the fact that "special fee considerations have not been granted (by the Federal agencies concerned) to rural electric and telephone lines financed under REA." S. Rep. No. 388, 98th Cong. 2d Sess. (1984).

[1] A reading of the legislative history of the amendment, therefore, leads ineluctably to the conclusion that only rights-of-way for transmission lines were intended to be given special treatment by the legislators. There is also indication in the remarks spread on the congressional record by the

debaters that the amendment was intended to benefit only REA Cooperatives and was not intended to extend to any public utility which might receive funding under the Rural Electrification Act of 1936. (See, e.g., Cong. Rec. at H9317, remarks by Congressmen Seiberling and Marlenee.) Because the apparent intention of the amendment was, however, to apply to transmission lines rather than to wireless stations, this question need not now be resolved, since the microwave site here concerned does not use transmission lines. It is sufficient, considering the scope of the review authority of this Board, to ascertain that the amendment of section 504(g) does not apparently affect the prior policy of the Department concerning the annual charge of a fair market value for the microwave right-of-way sought by appellant. See 43 CFR 2803.1-2. As was pointed out in Colorado-Ute Electric Association, Inc., supra, this Board has previously held that 43 CFR 2803.1-2 does not permit free right-of-way use by Colorado-Ute, since it derives a principal source of revenue from customer charges. Id. at 79 IBLA 57; 43 CFR 2803.1-2(c)(1).

[2] Appellant has, however, raised factual matters which merit consideration by BLM and require additional fact-finding concerning the value of the site used by Colorado-Ute. This fact-finding may properly be conducted by the BLM office concerned in the same manner as the hearing required to be conducted in Colorado-Ute Electric Association, Inc., supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case file remanded to BLM for further action consistent with this opinion.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge